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In The

Supreme Court of the United States

October Term, 1989

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

vs.

LOUIS W. SULLIVAN, M.D., IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; OFFICE OF CHILD SUPPORT ENFORCEMENT, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEPARTMENTAL GRANT APPEALS BOARD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether a Panel of the United States Court of Appeals for the Fourth Circuit erred in making the following holdings:

1. That 42 C.F.R. § 304.50 is a reasonable interpretation of 42 U.S.C. § 655(a) even though § 304.50 exceeds and conflicts with the plain language of § 655 and its legislative history?

2. That § 304.50 is consistent with the Intergovernmental Cooperation Act, (31 U.S.C. § 6503) even though § 304.50 attempts to recover, from the states, interest earned on child support collections that function as grant money and § 6503(a) provides that states shall not be held accountable for interest earned on grant funds?

3. That § 304.50(b) does not constitute a retroactive application of § 655(a) even though this regulation does not provide for retroactive application, even though the harm to the South Carolina Department of Social Services from such an application outweighs the harm to the federal agency, even though § 304.50 added to the requirements of § 655 and even though the federal agency has applied § 655 inconsistently?

PARTIES IN THE COURT OF APPEALS

The parties are listed in the caption; however, for the convenience of the Court, the Petitioner South Carolina Department of Social Services will be referenced herein as DSS. The Respondents are all officers or divisions of the United States Department of Health and Human Services (HHS) which shall be collectively referenced herein as the Secretary.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit Panel, entered on March 5, 1990.

OPINIONS BELOW

On December 14, 1987, the Departmental Grant Appeals Board of the United States Department of Health and Human Services (HHS) upheld the South Carolina Department of Social Services' (DSS) appeal of the disallowance of $777,746.00 in claims for federal financial participation by DSS because DSS had not credited the federal government with interest earned on child support collections. (App. Ex. F, *infra*, p. 28a). The instant action then followed.

On July 14, 1989, the District Court granted the Secretary's motion for summary judgment. This decision of the Honorable Karen LeCraft Henderson is unreported but appears in the Appendix as Exhibit D.

DSS appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. On March 5, 1990, the Panel affirmed the decision of the District Court in a short per curiam opinion. This opinion appears in the Appendix as Exhibit A, *infra*, p. 1a.

JURISDICTION

This Court has jurisdiction to review the final decision of the Court of Appeals entered March 5, 1990, under 28 U.S.C. § 1254(1).

STATUTES TO BE CONSTRUED

The decisions below construed the following Acts of Congress and Regulation of HHS which are set forth, in part, as follows:

> *42 U.S.C. § 655(a)(2)(C)* . . . In determining the total amounts expended by any state during a quarter, for the purposes of this subsection, there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan approved under this part [42 U.S.C.S. § 651 *et seq.*]. (Text reprinted in full at Appendix, Ex. G, *infra*, p. 39a).
>
> *31 U.S.C. § 6503(a)* Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between the transfer of the money from the Treasury and the disbursement by a state, whether the disbursement occurs before or after the transfer. A state is not accountable for interest earned on grant money pending its disbursement for program purposes. (Text reprinted at Appendix, H, *infra*, p. 41a).
>
> *45 C.F.R. § 304.50. Treatment of Program Income.* The IV-D agency must exclude from its quarterly expenditure claims an amount equal to:
>
> (a) All fees which are collected during the quarter under the Title IV-D State Plan; and
>
> (b) All interest and other income earned during the quarter resulting from services provided under the IV-D State Plan. (Text reprinted at Appendix I, *infra*, p. 42a).

STATEMENT OF THE CASE

I. The Parties And The Nature Of The Claim

Through Regulation 45 C.F.R. § 304.50 and through other administrative action, the Secretary has exceeded his authority under 42 U.S.C. § 655 to offset, against reimbursable expenses of the South Carolina Department of Social Services (DSS), (offset) "fees collected or other income resulting from services provided" under DSS's Child Support Enforcement Plan. His actions and § 304.50 attempt to require DSS to offset interest earned by the South Carolina State Treasurer on child support collections even though investments are not a child support service under § 655. The Secretary's determinations and § 304.50 are also inconsistent with the Intergovernmental Cooperation Act which bars the collection of interest on grants held by the states such as the child support collections here made by the South Carolina Department of Social Services (DSS) which function as grants. 31 U.S.C. § 6503(a). The Secretary and the other respondents are officers or divisions of the United States Department of Health and Human Services (HHS) which is charged with the operation of the Child Support Program on the federal level. DSS is an agency of the State of South Carolina and is charged with the operation of that program on the state level.

The interest money in question was earned by the South Carolina State Treasurer rather than by DSS. (Record below (R), 35 and 36). The interest was earned by the Treasurer on child support collections made by DSS pending their disbursement to the recipients. Neither DSS nor the Treasurer were required by state or federal law

for the Child Support Enforcement Program (Child Support Program) to invest this money. Had the money never been invested, the parties would not be in court today.

Under the Child Support Program, the Secretary reimburses DSS for the federal share of administrative costs expended by DSS for the operation of the Child Support Program according to the formula set forth at 42 U.S.C. § 655. These reimbursements were made during the period in question, October 1, 1981 to June 30, 1986. (Record below, 59, 73, 85, 97 and 118). Under § 655, the provision in question, these reimbursements were to exclude "income resulting from services provided under this part," which should not include interest earned by the South Carolina State Treasurer on child support collections because interest is not a service provided by DSS under the Child Support Program.

Although § 655 does not authorize the offset of interest, the Secretary adopted Regulation 45 C.F.R. § 304.50 which erroneously provides for such an offset. The Secretary's actions and § 304.50 clearly exceed the scope of the Secretary's authority under § 655 because investments are not services provided under Child Support Enforcement plans under § 655. Moreover, because the collections replace payments for families entitled to Aid to Families with Dependent Children (AFDC) which DSS would normally receive from the Secretary, the collections function as grants under the Intergovernmental Cooperation Act and are exempt from accountability for interest under that statute. Finally, even if, *arguendo*, § 304.50 were otherwise valid, the Secretary has erroneously applied this regulation retroactively because the regulation does not provide for retroactive application, because DSS is harmed more by the retroactive application than HHS would

be harmed absent such application, and because the Secretary has applied § 655 inconsistently.

II. The Proceedings Below And The Issues For Review.

Despite a prior audit and one of two earlier audits that did not mention the interest issue, HHS erroneously determined that $777,746.00 in interest earned by the investments of the State Treasurer on South Carolina's Child Support collections during the above 1981-1986 period should be offset against reimbursable expenses of DSS. (R.101). DSS requested that HHS review that decision, and the Director of the Office of Child Support Enforcement at HHS upheld the decision. (Record below, 103 and 108). DSS appealed the decision to the Grant Appeals Board which upheld HHS' action (App. Ex. E, *infra*, p. 21a).

This action was then brought in the District Court and, to determine jurisdiction, a related Petition for Review was also brought in the United States Court of Appeals for the Fourth Circuit. *See South Carolina Department of Social Services v. Otis R. Bowen, et al.*, 866 F.2d 93 (4th Cir., 1989). Approximately two months after this action was filed, the District Court granted a preliminary injunction restraining efforts by the Secretary to offset interest earned by the State of South Carolina on Child Support Program collections against reimbursable expenses or by any other means. (*See* App. Ex. D, *infra*, p. 7a). On May 26, 1988, the District Court granted a stay of this action pending disposition of DSS's Petition for Review before the Court of Appeals. *Id.* The preliminary injunction was to continue in effect during this stay.

The Court of Appeals' proceeding was brought because of the absence of precedent in the Fourth Circuit as to whether the jurisdiction of this proceeding would exist in the Court of Appeals or the District Court. The Court of Appeals ruled that jurisdiction in this matter rests with the District Court and dismissed those proceedings before the Court of Appeals. *S.C. Department of Social Services v. Bowen*, 866 F.2d 93 (4th Cir. 1989). The District Court did have jurisdiction here under 5 U.S.C. § 702. *See Bowen, supra.*

Following the disposition of this matter in the Court of Appeals, this case proceeded in the District Court. By Order dated July 14, 1989, the District Court granted the Secretary's motion for summary judgment and denied DSS's summary judgment motion. (App. Ex. D, *infra*, p. 7a). The Court erroneously found that the Secretary's interpretation of § 655 as permitting the offset of interest earned on child support collection was not "arbitrary or capricious" even though investments are not a Child Support Program service. *Id.* The Court further found that the Secretary could recover the interest retroactively for nearly three years prior to the adoption of Regulation 45 C.F.R. § 304.50 which states that the interest would be subject to offset but which makes no provision for retroactive application.

DSS moved for a stay on appeal which was granted by the District Court by Order dated August 22, 1989. (App. Ex. E, *infra*, p. 21a). In its Order granting the stay, the District Court noted the severe impact that collection of this interest money would have upon the Child Support Program in South Carolina with only negligible impact upon the Secretary. *Id.* The District Court had not

made such a finding earlier in its Order granting Summary Judgment.

On appeal, the Court of Appeals erroneously found that § 304.50 was a reasonable interpretation of § 655 which was consistent with the Intergovernmental Cooperation Act and not a retroactive application of § 655. (App. Ex. A, *infra*, p. 1a). DSS submits that this interpretation and application are not reasonable because the investment of the collections was not a service of the Child Support Enforcement Program, because § 304.50 impermissibly added to the requirements of § 655 and because the retroactive application here is neither authorized by the regulation nor appropriate under the factors normally analyzed by the courts.

The mandate has issued to the District Court. DSS did not move for stay of the mandate (Rule 41, Federal Rules of Appellate Procedure) because counsel is informed that DSS now has some funds available for use this fiscal year for partial payment of the interest in question which would not have been available earlier when the District Court issued the above stays.

REASONS FOR GRANTING THE WRIT

DSS submits that a writ of certiorari should be issued now because the questions presented affect a number of other states and they are significant because they address whether an agency regulation can be upheld under a reasonableness standard of review when, as here, the regulation clearly conflicts with the language and

legislative history of an act of Congress. Here, 45 C.F.R. § 304.50 is inconsistent with the plain language of 42 U.S.C. § 655(a)(2)(C) and conflicts with the congressional history of the law and the plain language of 31 U.S.C. § 6503(a). In addition, the decisions below, in upholding retroactive application of § 304.50, fail to give effect to the decisions of this Court and the circuits concerning retroactivity.

I.

THE QUESTIONS PRESENTED ARE OF SIGNIFICANT IMPORTANCE IN THAT THEY AFFECT A NUMBER OF OTHER STATES.

The questions presented now are of significant importance in that they affect a number of other states. The Secretary's Motion for Publication of Opinion in this case below, which was denied, (App. Exs. B and C, *infra*), notes that *"a number of states"* have raised issues concerning the treatment of interest within HHS' review processes and that " . . . there is reasonable likelihood that there will be future litigation in other circuits." (emphasis added). The Supreme Court's deciding this matter now would avoid future litigation and financial losses for these other states as well as South Carolina, which has over $777,000.00 at stake. A decision here would also provide further guidance in future matters as to the limits of federal regulatory action in excess of statutory authority.

II.

THE QUESTIONS PRESENTED ARE OF SIGNIFICANT IMPORTANCE BECAUSE THE SECRETARY'S ACTIONS AND § 304.50 CLEARLY EXCEED APPLICABLE CONGRESSIONAL AUTHORITY.

Deference to an agency's interpretation of a statute is " . . . constrained by [a court's] obligation to honor the clear meaning of a statute as revealed by its language, purpose and history." *Southeastern Community College v. Davis*, 442 U.S. 397,411, 60 L.Ed.2d 980, 99 S.Ct. 2361,2369 (1979). Because § 304.50 goes beyond the terms of § 655, this regulation and the Secretary's actions are invalid.

A. THE ACTIONS OF THE SECRETARY AND 45 C.F.R. § 304.50, CLEARLY EXCEED AND CONFLICT WITH THE LANGUAGE AND HISTORY OF 42 U.S.C. § 655.

The plain meaning (*See Skelton v. Lowen*, 850 F.2d 200,202 (4th Cir. 1988)) of the words "income resulting from services provided under the plan" under § 655, does not encompass interest on child support collections, which 45 C.F.R. § 304.50 attempts to recover, because such funds do not result from any provision of a child support enforcement service. Instead, such interest is a function of the investment activities of the State Treasurer of South Carolina, which are not a child support enforcement service. The investment of child support collections is not required by any federal law nor any state law for the Child Support Program.

The interest money that HHS is erroneously seeking to recover from DSS would not have been generated if the State Treasurer had not elected under state law

(§§ 11-13-30 and 11-13-125 of the *Code of Laws of South Carolina*, 1976, (App. 35 and 36) to invest the child support collection money rather than let it sit idly in a non-interest bearing account. Any interest produced as a result of the State Treasurer's investments goes into the State General Fund, not to DSS. §§ 11-13-30 and 11-13-125. Therefore, the earning of this interest is clearly not " . . . income resulting from services provided under [DSS's] plan . . . " for provision of child support enforcement services that must be offset under § 655; however, contrary to the District Court's decision in this matter, the fact that the South Carolina Treasurer is the person making the investments is not controlling. The investments would still not be such a service even if DSS had made them because they are not a function of the Child Support Enforcement Program.

That § 655 reaches income only from *program* services rather than interest from investment activities is supported by the clearly indicated intent of Congress to reach only costs and fees for child support services to families *not* receiving Aid to Families with Dependent Children (non-AFDC), the only clients required to pay fees for non-AFDC child support services. "The first step in construing legislative intent is to examine the statutory language", and the language of the enabling statute shows that § 655 reaches only fee paying non-AFDC families. *Abbott v. City of Virginia Beach*, 879 F.2d 130,132 (4th Cir. 1989). The title to § 2333(c) of Public Law 97-35, which added the part now codified as § 655(a)(2)(C), reads "Cost of Collection and Other Services for *Non*-AFDC Families" (emphasis added). App., Ex. J, *infra*, p. 43a. Moreover, every part of § 2333 preceding Part (c),

which is the last part and the part in question, addresses non-AFDC fees. Because all other parts of § 2333 address non-AFDC cases only, the language of this statute clearly indicates that Part (c), the final part must, as its title states, address fees and income from services for non-AFDC cases only. *See United States v. Shell Oil Co.*, 605 F.Supp. 1064 (D. Colo. 1985). Instead, the interest money in question is being erroneously sought from AFDC as well as non-AFDC cases and does not result from the provision of child support services.

The following reports concerning this legislation reference only non-AFDC matters and show that recovery of interest was not contemplated by Congress. *U.S. Code Congressional and Administrative News*, 97th Congress, First Session, Vol. 2 at 707,708 (1981); *U.S. Code Congressional and Administrative News*, 97th Congress, First Session, Vol. 2 at 1348 (1981). The Senate Finance Committee Report's estimate of the budgetary impact from § 2333 included only the estimated savings resulting from a mandatory 10% fee for non-AFDC families which replaced former provisions for the optional recovery of costs in excess of an application fee. *U.S. Code Congressional and Administrative News*, 97th Congress, First Session, Vol. 2 at 789. The Report made no mention of any savings resulting from application of § 655 to interest money. § 2333. *Id.* In addition, the Congressional Budget Office's Report estimated the 1981-86 effects on the federal budget. *Id.* at 824. The Report found that requiring the states to collect a fee equal to 10% of the child support owed from non-AFDC matters would produce "new savings . . . due to decreased federal matching payments." *Id.* Nowhere does the Report estimate a budget savings due

to the offset of interest money. Therefore, clearly Congress did not intend for such offsets to be made.

Moreover, the Secretary of HHS, in sending the bill that included § 2333 to the Speaker of the House of Representatives, clearly indicated that a purpose was to provide for offset of fees in non-AFDC cases. (Record below, 52-54). The summary of the bill attached to his letter states that "fees collected for providing services under the State plan for [non-AFDC] families must be applied as an offset against the State's administrative costs for which it claims federal matching." (R54).

The District Court recognized that "DSS's position has some merit" as to the application of § 655 to non-AFDC fees and income but erroneously relied upon the separate codification of that provision to conclude that § 655 did not apply only to non-AFDC matters. The Court erred here because the codification is merely neutral and does not limit the legislative history and other statutory indications that § 655 applies only to non-AFDC matters. "It will not be inferred that Congress in revising and consolidating the laws intended to change their effect, unless such intent be clearly expressed." *Finley v. U.S.*, ___ U.S. ___, 104 L.Ed.2d 593, 109 S.Ct. [Interim Ed.] 2003 (1989); *See also U.S. v. Ryder*, 110 U.S. 729,740, 28 L.Ed. 308, 4 S.Ct. 196,201 (1884).

That the codification was not intended to change the scope of the applicability of § 655 is further indicated by the legislative history of that codification in the 1982 amendments to § 2333. PL 97-248 § 171 authorized the recovery of any "cost in excess of the fees" instead of the flat 10% recovery of costs under § 2333(c) and, in effect,

recodified § 2333(c) as § 655, 96 Stat. 401 (Add. to Brief of Plaintiff-Appellant at p. 42) instead of under § 653, Parent Locator Service, where § 2333(c) had apparently miscodified it. The title to § 171 is "Fee for services to non-AFDC families" and the effect of the changes made in the Child Support Program by § 171 are described in the Senate Report (*U.S. Code Congressional and Administrative News*, Vol. 2, 97th Congress, Second Session, pp. 790 and 830) and the House Conference Report (*Id.* at 1232). Those reports indicate no intent whatsoever to broaden the reach of § 2333(c) by recodifying it. *See Sutherland Statutory Construction*, Vol. 2A § 28.11. Therefore, the legislative history of § 655 conclusively shows that Congress had no intent to apply it to interest earned on child support collections.

Finally, in apparently concluding that DSS's interpretation of § 655 as applying only to non-AFDC matters gave no meaning to the words "other income" therein, the District Court erroneously overlooked that non-AFDC "costs in excess of fees" under § 654(6)(D) would clearly constitute "income resulting from services." App. pp. 13a and 14a. Section 655 was intended to apply to these non-AFDC costs and fees, not investments of the State Treasurer.

The plain meaning and congressional history of § 655 conclusively demonstrate that Congress had no intent to apply that statute to interest earned on child support collections. HHS regulation 45 C.F.R. § 304.50, which was not adopted until September 19, 1984, nearly three years into the period in question, erroneously added to the provisions of § 655 by inserting, as follows, the requirement that agencies exclude interest from expenditure

claims: " . . . [a]ll interest and other income earned during the quarter resulting from services provided under the IV-D State plan." § 304.50(b). (emphasis added). Applying, *arguendo*, the Fourth Circuit's use of the reasonableness standard for review of agency regulations, § 304.50 is clearly unreasonable because it exceeds the requirements of § 655.

That § 304.50 exceeds the requirements of § 655 is further supported by the interpretation given similar language to § 655 in an earlier version of 45 C.F.R. § 304.50. According to 48 Fed. Reg. 41454 (Thursday, September 15, 1983), the original proposed version of the regulation now codified as 45 C.F.R. § 304.50 read, in part, as follows:

> "The IV-D Agency must exclude from its quarterly expenditure claims an amount equal to: . . .
>
> (b) All *income* earned during the quarter *resulting from services provided* under the IV-D State plan." [Add., *infra*, 47].

See also 48 Fed. Reg. 41450 [introductory part] [September 15, 1983]. Published comments concerning this proposed rule include the following comment in paragraph 29 at 49 Fed. Reg. 36771 (September 19, 1984) (Add., *infra*, 48):

> "Comment: One individual suggested that, because interest income may be construed as exempt from the requirement to exclude earned income from quarterly expenditure claims for Federal funding, the proposed regulations at 45 C.F.R. 304.50(b) should be revised to specify interest income.
>
> Response: We agree that interest income could possibly be construed as exempt from the

> proposed § 404.50(b). Therefore, we revised the final 45 C.F.R. 304.50(b) to require the IV-D agency to exclude from its quarterly expenditure claims an amount equal to all interest and other income earned during the quarter resulting from services provided under the IV-D State plan."

See also 49 Fed. Reg. 36764 [introductory provisions for section] (September 19, 1984). Therefore, the Secretary interpreted language similar to § 655 as excluding interest, and he lacked the authority to add interest to the requirements of that statute in § 304.50.

" . . . [T]he judiciary is the final authority on issues of statutory construction and must reject administrative interpretations that are contrary to clear Congressional intent." *Hicks v. Cantrell,* 803 F.2d 789 (4th Cir., 1986). To construe § 304.50 to apply to interest earned from the State Treasurer's investments would be contrary to clear Congressional intent as expressed in § 655 and its history, and HHS and its Secretary and OCSE are prohibited from attempting to recover that interest.

B. § 304.50 AND THE ACTIONS OF THE SECRETARY CONFLICT WITH 31 U.S.C. § 6503(a).

The regulation and the Secretary's actions directly conflict with the Intergovernmental Cooperation Act, 31 U.S.C. § 6503, which provides at paragraph (a) that "a State is not accountable for interest earned on grant money pending its disbursement for program purposes." Because, as described below, child support collections become part of the federal grant-in-aid pool, § 6503(a)

applies here and bars HHS from holding DSS accountable for the interest on the collections.

When monthly child support collections are made by a State agency such as DSS, a part of the collections on AFDC families, as defined in 45 C.F.R. § 302.51, may be retained by the State as reimbursement for that month's AFDC assistance payments. The State reduces the amount of AFDC grant monies drawn down from the Federal Government each month by the amount of the Federal share of the child support monies collected. *See* 45 C.F.R. §§ 232.20(c) and 302.51(b)(4). These child support collections then replace Federal AFDC grant funds to which the State would be entitled if the child support funds had not been collected by the State. The child support collections are then disbursed as AFDC assistance payments by DSS. Therefore, the Federal share of the child support collections becomes identical to and commingled with the AFDC grant funds, and the State could not, therefore, be held accountable to the Federal Government for interest earned on AFDC child support collections under the terms of 31 U.S.C. § 6503(a). This effect of § 6503(a) further supports the conclusion that § 655(a)(2)(C) applies only to non-AFDC fees.

The District Court erred in concluding that the child support collections are not covered under § 6503 because they do not constitute grant money as defined under § 6501(4)(A). This reading of the definition by HHS is erroneous in that the definition of grants covered by the Intergovernmental Cooperation Act includes money not only "paid" by the United States Government but also "provided" by the United States Government. Under the ordinary meaning of the word, money can be "provided"

by making arrangements for its provision as well as by paying it directly. "Provide", *Oxford English Dictionary; See also Holick v. Smith,* 685 S.W.2d 18,21 (Tex. 1985). Accordingly, the child support collection money in question here, while not money flowing directly from the coffers of the federal government, is "provided" by the government, as defined in § 6501(4)(A), in that these child support collections are used to replace AFDC Grant-in-Aid Funds to which the State would be entitled if the child support funds had not been collected by the State. *See* 45 C.F.R. §§ 232.20(c) and 302.51(b).

The District Court erred in finding *Holick* to be inapplicable on the basis that it was a termination of parental rights case. *Holick's* interpretation of "provided" is in accord with the ordinary meaning of the word which can include, as here, making arrangements for the payment of money as well as direct payment. *See* "Provide", *Oxford English Dictionary.* This meaning is also in accord with the statutory definition of "grant" which includes money that, as here, is conditioned upon the States' payment of non-federal money which the State is required to do under the Child Support Enforcement Program. 31 U.S.C. §§ 6501(4)(A) and 42 U.S.C. §§ 602(a)(27), 603 and 654.

The District Court erroneously concluded that construing § 6503 so as to make it inapplicable to the interest on collections helped to harmonize that statute with § 655. Instead, the District Court's construction fails to give full effect to § 6503. *See United Hospital Center, Inc. v. Richardson,* 757 F.2d 1445 (4th Cir. 1985). Construing § 655 so as to make it inapplicable to interest money is consistent with the statute's express applicability only to income resulting from child support services, and that

construction gives effect to § 6503's exemption of states from accountability on interest earned on grants.

The District Court also erroneously concluded that allowing the State to earn interest on the collections would be inconsistent with the purpose of § 6503. The Court misreads that statute's purpose as being to limit State interest earnings on grants. Instead, § 6503 states that federal agencies shall transfer grant money " . . . to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State. . . ." Whether South Carolina earns interest on the money during that time period has no effect on "minimizing the time." Instead, exempting DSS from accountability for interest gives effect to the express statement in § 6503 that a "State is not accountable for interest earned on grant money".

The District Court also erroneously concluded that § 6503 would not apply to the collections because the federal government could not control how they are disbursed, but this conclusion overlooks that the federal government can, through regulation, affect the time of the disbursement of child support collections. Moreover, regardless of the extent to which the collections are subject to transfer authority, the plain meaning (*see Skelton, supra*) of § 6503 is that a State is not accountable for interest on grant money. The collections clearly function as grants and DSS is not accountable for them.

Finally, this case is distinguishable from *State of North Carolina v. Heckler*, 584 F.Supp. 179 (DCNC 1984) which involved a dispute over the Federal Government's right to interest earned on Medicaid funds held by the state. In

that case, the court refused to apply § 6503(a) to interest money on Medicaid funds held by North Carolina because the state had wrongfully procured the funds in question. Instead, in the instant matter, the funds on which the disputed interest was earned were lawfully acquired by the State of South Carolina and, as set forth above, they are identical to and commingled with grant funds drawn from the government which are being held pending their disbursement by the State. Therefore, § 6503(a) bars federal recovery of this interest money.

C. THE SECRETARY CANNOT REQUIRE DSS TO OFFSET INTEREST FOR THE PERIOD OCTOBER 1, 1981 THROUGH SEPTEMBER 19, 1984 BECAUSE REGULATION 45 C.F.R. § 304.50 WAS NOT ADOPTED UNTIL SEPTEMBER 19, 1984, AND IT CANNOT BE APPLIED RETROACTIVELY.

Even if, *arguendo*, § 304.50 were valid, DSS would not be accountable for interest earned on collections prior to September 19, 1984 when 45 C.F.R. § 304.50 (R. (below) 84) was published. The regulation cannot be applied retroactively here. One of the points " . . . against retroactive application is that the regulation makes no mention of [its] being applied retroactively", and § 304.50 contains no such mention of retroactivity. *White v. Califano*, 473 F.Supp. 503,506 (SD W.Va. 1979). Moreover, the other reasons discussed below also require that § 304.50 be applied prospectively only.

The Courts use a balancing test to determine whether retroactivity is appropriate by balancing the harm resulting from a retroactive application against any harm resulting from not having a retroactive application. *Securities and Exchange Commission v. Cherney Corporation,*

332 U.S. 194, 91 L.Ed. 1995, at 2002,2003, 67 S.Ct. 1575, 1581 (1947); *Bedford County Memorial Hospital v. Department of Health and Human Services*, 769 F.2d 1017,1024 (4th Cir. 1985). Under this balancing test, the ill effect on the South Carolina Child Support Enforcement Program caused by the payment of the $777,000.00 in interest accrued on the collections outweighs the Federal Government's interest in imposing retroactively its interpretation of § 655 as encompassing interest earned on child support collections. Similarly, in *White, supra*, more stringent eligibility standards for social security disability benefits were found to be inappropriate for retroactive application.

Although, in its Order granting Summary Judgment, the District Court concluded that the balance of harm here did not preponderate for or against any party, the Court later concluded otherwise in its Order granting DSS a stay on appeal (App., Ex. E, *infra*, p. 21a). The Court concluded that DSS had made a " . . . strong showing that its Child Support Enforcement Program will have suffered irreparable losses affecting its future operations." *Id.* The Court further noted the " . . . public harm that would result from less success in locating absent parents and decreased collections of child support payments." *Id.* This harm to DSS clearly makes retroactive application of § 304.50 inappropriate as to DSS.

Although counsel for DSS is informed that DSS now has some funds available for at least partial payment of the interest in question here, DSS did not have such funds at the time these issues were addressed below in the District Court and DSS would not have been assured of obtaining this money had stays not been granted by that

Court. Therefore, the severity of the impact on DSS should be viewed in terms of the impact that retroactive application would have had had these stays not been granted. Clearly, under that view, the balance of harm rests with DSS.

The District Court's conclusion that § 304.50 could be applied to the 1981-84 period because it merely interpreted or clarified existing law is misplaced. Regulation 304.50 did more than merely clarify existing law. It added to the requirements of § 655 by specifying what income would constitute income resulting from services. Section 304.50 is clearly a legislative rather than interpretive regulation because the Court of Appeals has found that when a regulation is adopted pursuant to the Administrative Procedures Act (APA), as was § 655, that regulation is normally legislative rather than interpretive. *U.S. v. Shelton Coal Corp.*, 829 F.2d 1336 (4th Cir. 1987).

The problem of applying § 304.50 retroactively is particularly evident in the fact that the first and third of three audits done by the Secretary during the period in question made no mention of DSS's not excluding the interest on the collections even though the audits' purpose was to examine the cost claimed for federal funding under the Child Support Program. (Record below, 59,62,71,73,85 and 95). Audits are supposed to be complete and comprehensive as to the conformity of the operation of state programs with federal requirements (42 U.S.C. § 652(a)(4) and 45 C.F.R. §§ 305.10 and 305.36). Therefore, the failure of the Secretary to mention the interest issue in the last of these audits during the period gave DSS reason to believe that DSS's treatment of the interest money was correct and that the Secretary was not

following a prior action transmittal concerning interest (OCSE Action Transmittal 82-8) which was invalid because it was not APA adopted. 5 U.S.C. § 553, *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740 (3rd Cir., 1969).

Clearly, this change of positions by OCSE is similar to the inconsistency in positions taken by administrative agencies which have been noted by the courts in their refusal to give retroactive effect to agency rulings. *See Standard Oil Company v. Department of Energy*, 596 F.2d 1029 (Temp. Emerg. Ct. of App., 1979). In *Skidmore v. Swift and Comnany*, 423 U.S. 134,140, 89 L.Ed. 124,129, 65 S.Ct. 161,164 (1944), the Supreme Court said that the weight to be given to an agency's administrative rulings depends upon " . . . the thoroughness evident in its consideration, the validity of its reasoning, its *consistency with earlier and later pronouncements*, and all of those factors which give it the power to persuade." (emphasis added). Here, not only is § 304.50 inconsistent with the terms of § 655, it is inconsistent with earlier and subsequent audit reports and with the 1981 interpretation of the provision by the secretary of HHS. Therefore, applying this regulation retroactively would be inappropriate because of these inconsistencies as well as because of the harm that would result to DSS.

CONCLUSION

The decisions below erroneously uphold a regulation and actions of the Secretary which clearly exceed the intent of Congress as expressed in 42 U.S.C. § 655 and 31

U.S.C. § 6503. These errors are compounded by the retroactive application of the regulation of DSS contrary to the judicial tests applied for determining retroactivity. The application of this regulation to DSS has an adverse impact upon the Child Support Enforcement Program in South Carolina (see page 21, *supra*) and if applied in other jurisdictions could have an adverse impact upon the programs in other states. Because the Secretary in § 304.50 had clearly exceeded the bounds of agency authority and because this matter will affect a number of other states, the South Carolina Department of Social Services respectfully requests that Certiorari be granted to correct these errors.

Respectfully submitted,

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May 29, 1990

APPENDIX

EXHIBIT A

The Court of Appeals Panel Decision

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2758

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Plaintiff – Appellant,

versus

LOUIS W. SULLIVAN, SECRETARY OF HEALTH, AND HUMAN SERVICES; OFFICE OF CHILD SUPPORT, U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEPARTMENTAL GRANT APPEALS BOARD, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants – Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Karen L. Henderson, District Judge. (CA-88-326-3-16).

Argued: January 10, 1990 Decided: March 5, 1990

Before ERVIN, Chief Judge, WILKINSON, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: James Emory Smith, Jr., SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE, Columbia, South Carolina, for Appellant. Robert David Kamenshine, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE Washington, D.C., for Appellees. ON BRIEF: Joseph D. Shine, SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE, Columbia, South Carolina; N. Bruce Holland, SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, Columbia, South Carolina, for Appellant. Stuart M. Schiffer, Acting Assistant Attorney General, William Kanter, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; E. Bart Daniel, United States Attorney, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.4 and 36.5.

PER CURIAM:

The South Carolina Department of Social Services appeals from the district court's grant of summary judgment in favor of the Secretary of Health and Human Services. The Department of Social Services contends that the district court erred in approving the Secretary's promulgation and enforcement of 45 C.F.R. § 304.50(b) which it contends is consistent with the terms of Title IV-D of the Social Security Act, 42 U.S.C. § 655(a), and of the Intergovernmental Cooperation Act, 31 U.S.C. § 6503. The Department also maintains that even if 45 C.F.R. § 304.50(b) is consistent with the statutes, it should not be applied retroactively to deny the Department interest accumulated during the period from October 1, 1981, through September 19, 1984.

We recognize that the district court applied an incorrect standard of review to the Secretary's interpretation of 42 U.S.C. § 655(a). The Secretary's interpretation, as manifested in the regulation he has promulgated, must stand as long as it is reasonable. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

Otherwise, we find no error in the district court's analysis. We agree that 45 C.F.R. § 304.50(b) is a reasonable interpretation of 42 U.S.C. § 655(a), that it does not constitute a retroactive application of the statute, and that it is consistent with the Intergovernmental Cooperative Act. We therefore affirm the judgment for the reasons stated in the opinion of the district court.

AFFIRMED

EXHIBIT B

The Motion For Publication of The Ct of Appeals Decision

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, Plaintiff-Appellant, v. LOUIS W. SULLIVAN, Secretary, United States Department of Health and Human Services, et al. Defendants-Appellees	No. 89-2758

APPELLEES' MOTION FOR PUBLICATION OF THE OPINION IN THIS CASE

Appellees, Louis W. Sullivan, et al. hereby move for publication of the Court's opinion in this case. The circumstances supporting this motion are as follows:

1. On March 5, 1990, this Court issued an unpublished opinion in this case affirming the decision of the district court and agreeing with its opinion, except as to standard of review.

2. The issues resolved by the Court in this case as to the validity of 45 C.F.R. 304.50(b), its non-retroactivity, and its consistency with the Intergovernmental Cooperation Act have importance beyond deciding HHS' dispute with the State of South Carolina. The matter of how to treat interest which a state earns on its federally funded child support collections is one which a number of states

have raised within HHS' review processes. Aside from the possibility that another state within this Circuit might seek to litigate this matter, there is a reasonable likelihood that there will be future litigation in other circuits. Thus, it would be useful to have a binding Fourth Circuit precedent containing this Court's express adoption of the district court's result and reasoning as to the regulation's validity, non-retroactivity, and consistency with the Intergovernmental Cooperation Act.

For the foregoing reasons, Appellees' Motion For Publication Of the Opinion In This Case should be granted.

Respectfully submitted,

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EXHIBIT C

(Filed March 20, 1990)

The Order of The Court of Appeals
Denying Publication

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2758

SOUTH CAROLINA DEPARTMENT
OF SOCIAL SERVICES, Plaintiff - Appellant

v.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES;
OFFICE OF CHILD SUPPORT,
U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES; DEPARTMENTAL GRANT
APPEALS BOARD, DEPARTMENT OF
HEALTH AND HUMAN
SERVICES, Defendants - Appellees

ORDER

Upon consideration of appellees' motion for publication of the opinion in this case;

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Ervin and Judge Butzner.

For the Court

JOHN M. GREACEN
CLERK

EXHIBIT D

The Order of The District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, Plaintiff, v. LOUIS W. SULLIVAN, M.D., in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; OFFICE OF CHILD SUPPORT ENFORCEMENT, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEPARTMENTAL GRANT APPEALS BOARD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	CIVIL ACTION NO. 3:88-326-16 ORDER (Entered 7-14-89)

I.

This matter is before the Court on cross-motions for summary judgment by the South Carolina Department of Social Services ("DSS") and by all of the defendants. The action arises because DSS has invested and earned interest on money it has collected through its child support enforcement efforts. The Department of Health and Human Services and the other defendants (collectively "HHS") maintain that the interest earned by DSS on invested child support collections belongs to the federal

government and HHS seeks to recover this money by withholding federal assistance until DSS surrenders the interest earned.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). All parties here agree that no genuine issue of material fact is in dispute.

Under the federally administered Child Support Enforcement Program ("CSEP"), HHS reimburses DSS for the federal share of administrative costs expended by DSS in operating the CSEP in South Carolina according to a formula set forth at 42 U.S.C. § 655. These reimbursements were made during the pertinent period, October 1, 1981 to June 30, 1986. In a letter dated January 12, 1987, the HHS Regional Representative of the Office of Child Support Enforcement (OCSE), the administrative unit of HHS charged with overseeing Title IV-D programs, advised DSS that HHS was disallowing $777,746 in reimbursements to DSS. The disallowance was based on a November 24, 1986, audit of DSS's administration of the CSEP revealing DSS had earned $1,110,571.59 in interest on child support collections from October 1, 1981, to June 30, 1986. DSS requested review of this decision and both the director of the OCSE and the Grant Appeals Board agreed with the disallowance decision.

DSS brought this action on February 5, 1988. By order entered on April 8, 1988, this Court granted a preliminary injunction restraining HHS's efforts to collect the interest

earned by offsetting the amount of interest earned against reimbursable expenses or by any other means. The Court further stayed this action pending disposition of the plaintiff's petition for review before the Fourth Circuit Court of Appeals to determine whether jurisdiction of this dispute exists in the court of appeals or the district court. The Fourth Circuit held that jurisdiction lies in the district court. *South Carolina Department of Social Services v. Bowen*, 866 F.2d 93 (4th Cir. 1989). All parties have now moved for summary judgment.

II.

Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 *et seq.*, ("Act") authorizes the OCSE to facilitate enforcement of support obligations owed by absent parents to their spouses and children, primarily those who are receiving Aid to Families with Dependent Children ("AFDC"). Under the statute, each participating state must have a plan approved and, upon approval, the federal government provides funding equal to specific percentages of "amounts expended by [the] State . . . for the operation of the plan approved." 42 U.S.C. § 655(a)(1).

Section 655(a) of the Social Security Act, as amended by section 2333(c) of Public Law 97-35 (effective October 1, 1981), 42 U.S.C. § 655(a), limits the amount of federal financial participation in the CSEP based on the availability of other sources of program funding at the state level. The Act provides in pertinent part:

> In determining the total amounts expended by any State during a quarter . . . there shall be excluded an amount equal to the total of any fees collected or other income resulting from

> services provided under the [Title IV-D state] plan.

42 U.S.C. § 655(a)(2).[1]

Although the statute containing this language does not specify that interest earned on child support collections is deemed to be "income resulting from services provided" under the CSEP, in Action Transmittal (OCSE AT-82-8, September 3, 1982) issued by the OCSE and a later regulation promulgated by HHS manifest that such interest is encompassed by the statute. AT-82-8 provides in part:

> Treatment of Program Income
>
> Under the revised section 455(a) of the Act [42 U.S.C. § 655(a)(2)], in addition to excluding fees and recovered costs from expenditures, State IV-D agencies must also exclude . . . an amount equal to all income resulting from services provided under the IV-D State Plan. This requirement applies to income related to both AFDC and non-AFDC cases. Under this provision, States must reduce their expenditures by the total interest earned on collections made under the IV-D State plan and by any other income earned from activities under the plan. At present, there are no regulations governing treatment of income earned as a result of providing IV-D services. However, OCSE plans to issue a proposed regulation governing this requirement within the next few months.

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[1] The codification of this section was altered by a recent amendment and it now appears at 42 U.S.C. § 655(a)(1). *See* Act of October 13, 1988, Pub. L. No. 100-485, Title I, § 112(a), 102 Stat. 2350. The Court uses the citation to section 655(a)(2) in references to this section throughout the order.

This administrative interpretation became a part of the regulations implementing section 455(a) of the Social Security Act on September 19, 1984. The regulation provides in pertinent part:

> The IV-D agency must exclude from its quarterly expenditure claims an amount equal to:
>
> . . . .
>
> (B) All interest and other income earned during the quarter resulting from services provided under the IV-D State plan.

45 C.F.R. § 304.50.

A.

DSS initially contends that the Court should reverse HHS's determination because HHS does not properly interpret the statute. The Court ruled in its April 8, 1988 order that it has subject matter jurisdiction pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.* Judicial review of the agency action is governed by 5 U.S.C. § 706(2)(A):

> a reviewing court [is] to set aside agency action if it appears in the record that such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard, however, a reviewing court is not to substitute its judgment for that of the agency, and the court is to show a proper deference to the expertise of the agency. The court should make a "searching and careful" inquiry of the record in order to ascertain whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

Duke Power Co. v. United States Nuclear Regulatory Commission, 770 F.2d 386 (4th Cir. 1985).

The statute provides that the federal funding is to exclude "an amount equal to the total of any fees collected *or other income resulting from services provided under the plan.*" *Id.* (emphasis added). The first question, then, is whether or not HHS's determination that interest earned on money collected through the program is "other income" property interprets the statute.

DSS argues that (1) interest earned is not income resulting from services provided but is instead income earned by the state treasurer's investment activity; and (2) interest earned goes not to DSS but to the general state treasury. HHS maintains that the term "other income" should be read to include interest income because interest is ordinarily considered to be income. Given this ordinary construction, HHS submits, some additional language would be necessary to take income out of the statute's scope. Merely because the interest is earned as a result of the state treasurer's investments rather than through DSS's direct investment does not mean that it is not income resulting from the program. The Court agrees with HHS in view of the fact that the treasurer would not have the money to invest without the federal program. Moreover, South Carolina's internal investment decisions cannot determine the correct construction of a federal statute.

DSS further contends that section 655(a)(2), which was added to the Social Security Act by section 2333(c) of Public Law 97-35, addresses only income earned from non-AFDC services and, inasmuch as the interest here is

derived from both AFDC and non-AFDC services, the statute is inapplicable. Under the program, AFDC recipients are not charged a fee for using the program. Non-AFDC clients, however, must pay a fee. Accordingly, the parties agree that the term "fees" in the statute refers to fees collected from non-AFDC participants in the program's services. DSS, however, argues that, because the amendment to the Social Security Act which added section 655(a)(2) addressed only fees for non-AFDC participants, its application to other income should also be limited to income derived from operation of the non-AFDC portion of the program. For support, DSS refers to the legislative history, noting (1) the title of section 2333 is "Modify Collection Fees for Non-AFDC Families"; (2) in the House Conference Report on the amendment the summary of section 2333 is entitled "Cost of Collection and Other Services for Non-AFDC Families"; (3) the legislative history of section 2333 does not mention AFDC recipients; and (4) all other parts of section 2333 deal only with non-AFDC clients.

While DSS's position has some merit, it does not render HHS's interpretation arbitrary or capricious. In support of its interpretation, HHS points out that section 655(a)(2) applies both to "fees" collected from non-AFDC clients and "other income." HHS argues that under plaintiff's interpretation of the statute the "other income" language has no meaning, a result to be avoided under the rules of statutory construction. *United States v. Wong Kim Bo*, 472 F.2d 720 (11th Cir. 1972). HHS further points out that, while the plaintiff is correct that all of section 2333 deals with non-AFDC fees, each of the other subparts to section 2333 except the portion in dispute here is codified

under 42 U.S.C. § 654. The portion in dispute here, however, is separately codified under section 655. The separate codification supports the conclusion that section 655(a)(2) is not limited in application to non-AFDC participants.

The Court concludes, therefore, that the interpretation given section 655(a)(2) by HHS, which allows interest earned by South Carolina on support collections to be included in "other income," is not arbitrary or capricious.

B.

DSS further contends that the State is expressly allowed under the Intergovernmental Cooperation Act ("Cooperation Act"), 31 U.S.C. § 6503, to keep interest earned on the child support collections because these funds are grant-in-aid funds pending disbursement. The Cooperation Act provides that "a state is not accountable for interest earned on a grant pending disbursement." 31 U.S.C. § 6503. The plaintiff characterizes the collections money as grant-in-aid funds under the Cooperation Act because when a state makes collections under the CSEP, a part of the collections involving AFDC families may be retained by the state as reimbursement for that month's AFDC assistance payments. The federal share of the child support collections is calculated and then "paid" to the federal government by the state when the state reduces the amount of AFDC grant monies drawn down from the federal government each month by the amount of federal share of the child support monies collected. *See* 45 C.F.R. §§ 232.20(c) and 302.51(b)(4). The plaintiff further explains:

> In other words, the child support collections replace federal AFDC grant-in-aid funds to which the State would be entitled if the child support funds had not been collected by the State. Those child support collections used as replacement funds are then disbursed as AFDC assistance payments by DSS. The Federal Share of the child support collections becomes identical to and commingled with the AFDC grant-in-aid funds, and the State could not, therefore, be held accountable to the Federal Government for interest earned on AFDC child support collections under the terms of 31 U.S.C. § 6503.

Memorandum in Support of Plaintiff's Motion for Summary Judgment, at 11.

The Court does not accept DSS's argument for several reasons. Where two statutes or two parts of a single statute appear to be inconsistent, it is the duty of courts to steer a course that vitiates neither provision but implements to the fullest extent possible the directives of each. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *United Hospital Center, Inc. v. Richardson*, 757 F.2d 1445 (4th Cir. 1985). Here, HHS's interpretation of the two statutes best harmonizes the apparent conflict and best implements the intent of each. First, the Cooperation Act was intended to reduce the amount of interest that states may earn on federal grant-in-aid funds. This intent is clear from the language of that Act immediately preceding the language that DSS relies upon in seeking to retain the interest earned:

> [T]he head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury

> and the disbursement by a State, whether disbursement occurs before or after the transfer. A State is not accountable for interest earned on grant money pending its disbursements for program purposes.

31 U.S.C. § 6503(a). To apply DDS's interpretation of the Cooperation Act would increase, rather than decrease, the state's opportunity to earn interest on federal funds in contravention of the Cooperation Act's clear purpose.

Second, the Cooperation Act defines a "grant" as "money . . . that is *paid or provided* by the United States Government under a fixed annual or total authorization, to a State." 31 U.S.C. § 6501(4)(A) (emphasis added). Here, the support collections are retained by the state, not "paid or provided" to the state by the federal government.[2] DSS maintains that, if it did not make the collections, the federal government would pay the AFDC funds directly and the State could earn money on such payments. From this premise DSS concludes that the manner by which a state receives the federal funds should not

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[2] DSS argues that "provided" can mean directly paid to or indirectly paid to the state as here. For support it relies on *Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985). *Holick*, however, is a Texas Supreme Court decision interpreting a state family law statute. In that decision the court notes that, because it is interpreting the statute in a termination of parental rights proceeding, it must construe that statute strictly in favor of the parent. In that context the court held that a parent may directly or indirectly support a child and remain within the statutory directive that a parent "provide" support. Here, the Court is under a duty to read two statutes harmoniously to give both their intended effect and is not required to construe the term "provided" in favor of DSS. Given these stark differences in context, the Court does not find *Holick* persuasive.

control the state's entitlement to interest under the Cooperation Act. The Court disagrees. When funds are transferred to the state for disbursement under a federal program, the federal agency has control over when to transfer the funds and can, therefore, maximize its interest earnings on the money as the Cooperation Act envisions. When a state already has the funds for disbursement in its control and uses these to offset funds that the federal government would otherwise have "paid or provided" to the state, the federal agency loses its opportunity to earn interest on the funds and the Cooperation Act has no application. Thus, the Cooperation Act does not apply here because the federal government has not paid or provided the funds to the state, but instead the state has used funds in its control to offset federal funding.

C.

DSS additionally contends that, even if HHS has properly interpreted the regulation, interest earned before that date cannot be recovered without impermissibly applying the regulation retroactively because the regulation was not promulgated until September 19, 1984. DSS contends that the Court should balance the harm resulting from a retroactive application against any harm resulting from not so applying the regulation. *See SEC v. Cherney Corp.*, 332 U.S. 194 (1947); *Bedford County Memorial Hospital v. Department of Health & Human Services*, 769 F.2d 1017, 1024 (4th Cir. 1985). DSS claims the balance of harm weighs more heavily against it because HHS initially did not interpret the statute to encompass interest income from collections and later changed its mind.

The Court concludes, however, that applying the statute as interpreted in the HHS regulation from the date of the statute's effective date is not improper here. First, even if the Court accepts DSS's argument that it should balance the harm to the parties, the balance of harm does not preponderate for or against any party – one or the other is going to suffer the loss of the same amount of money. The Court need not reach the balancing test advocated by DSS, however, because retroactive interpretation of the pre-existing statute is not impermissible in these circumstances. In *Anderson Clayton & Co. v. United States*, 562 F.2d 972, 985 n.30 (5th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) the Fifth Circuit Court of Appeals held that "[r]etroactive clarification of existing law involves no unfairness. It is retroactive change of settled law, not retroactive settling of unsettled law, which may produce unjust results." Here, the Court has already concluded that HHS's interpretation of the statute is a fair interpretation. When HHS later promulgated the regulation, therefore, it merely clarified the statute; it did not change the statute's meaning.

In addition, the Court relies on *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129 (1936), in which the the United States Supreme Court upheld a regulation that retroactively interpreted a pre-existing statutory requirement. In *Manhattan General* the Supreme Court held that an IRS regulation that replaced an earlier invalid regulation was applicable to calculate the losses of the plaintiff taxpayer. The taxpayer sought to have the earlier regulation applied, but the court held that the latter regulation applied, even though it was not in effect when the plaintiff incurred the losses, because the first

regulation invalidly interpreted the statute. The court further held that such a regulation "is no more retroactive in its operation than is a judicial determination construing and applying a statute to the case at hand." *Id.* at 135. Here, although HHS has indicated before adoption of the regulation that the statute could be subject to the interpretation that DSS seeks to give it, HHS did not issue any regulation assigning it that interpretation.[3] The Court

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[3] DSS argues that HHS, in a comment published after its initial draft of 45 C.F.R. 304.50, indicated that section 655(a)(2) can be interpreted to exclude interest on support payments from "income." In the first draft, the regulation did not specify that "other income" included interest earnings. *See* 48 Fed. Reg. 41,454 (1983). Comments about the proposed regulations published later stated that "interest income could possibly be construed as exempt from the proposed § 304.50(b). Therefore, we revised the final 45 CFR 304.50(b)." 49 Fed. Reg. 36,771 (1984). The Court does not find that this initial draft or the comment published thereafter supports DSS's position because they both merely reflect, as the Court has already recognized, that the statute may be read in more than one way. The draft and comments, however, did not set a policy favoring DSS's interpretation of the statute before promulgation of 45 C.F.R. 304.50, nor do they tend to show that HHS's current interpretation of the statute is arbitrary or capricious.

In addition, the Court does not assign great significance to DSS's contention that because prior audits did not object to the state's interest earnings on support collections, the current effort to enforce the regulations is improper. DSS has not demonstrated that it has suffered harm by the failure of prior audits to identify DSS's failure to include interest earnings as income from the CSEP. It also cannot demonstrate that its reliance was justifiable since the audits did not affirm the State's retention of interest but simply did not note it as erroneous.

(Continued on following page)

concludes therefore that the regulation may be applied to allow HHS to recover from DSS interest the latter earned on support payments from October 1, 1981, when the section 655(a)(2) was enacted.

Accordingly, the Court grants the defendants' motion for summary judgment and denies the plaintiff's summary judgment motion.

IT IS SO ORDERED.

/s/ Karen LeCraft Henderson
KAREN LeCRAFT
HENDERSON
UNITED STATES DISTRICT
JUDGE

Columbia, South Carolina
July 14, 1989

(Continued from previous page)

In its supporting memorandum DSS also disputes the Appeal Board's finding that regulations under 45 C.F.R. § 74.40 and Office of Management and Budget Circular A-87, which existed prior to 45 C.F.R. § 304.50, authorized inclusion of interest earned on support collections as income from services provided under the CSEP. Because of the Court's ruling based on other grounds sufficent [sic] to uphold the Board's finding, it does not reach this issue.

EXHIBIT E

The District Court Order Granting
Stay Pending Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, Plaintiff, v. OTIS R. BOWEN, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; OFFICE OF CHILD SUPPORT ENFORCEMENT, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEPARTMENTAL GRANT APPEALS BOARD, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	CIVIL ACTION NO. 3:88-326-16 ENTERED 8/28/89 ORDER

This matter is before the Court on the motion of plaintiff South Carolina Department of Social Services ("DSS") to stay the Court's judgment entered on August 2, 1989, pending appeal. The motion is made pursuant to Rule 62 of the Federal Rules of Civil Procedure and Rule 8 of the Federal Rules of Appellate Procedure. In its order and judgment the Court upheld the decisions of both the

Office of Child Support Enforcement and the Grant Appeals Board of the United States Department of Health and Human Services ("HHS") offsetting interest earned on DSS child support collections in the amount of Seven Hundred Seventy-Seven Thousand Seven Hundred Forty-Six ($777,746) Dollars against federal reimbursements due DSS under the child support enforcement program. DSS argues that it will be irreparably injured if the stay is not granted because it may be forced to eliminate many employment positions and may suffer a substantial drop in the number of absent parents located and support orders obtained. For the reasons set forth below, the Court grants the plaintiff's motion.

The factors regulating the issuance of a stay are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;
>
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
>
> (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Fourth Circuit has expanded on the first two factors, to wit:

> There is a correlation between the likelihood of plaintiff's success and the probability of injury to him. If the likelihood of success is great, the need for showing the probability of irreparable harm is less. Conversely, if the likelihood of success is remote, there must be a strong showing of the probability of irreparable injury to justify issuance of the injunction.

North Carolina State Ports v. Dart Containerline Co., 592 F.2d 749, 750 (4th Cir. 1979).

On January 12, 1987, the Audit Division of the office of Child Support Enforcement, HHS, first ordered a setoff for interest DSS earned on its child support collections, DSS requested the Director of the Office of Child Support Enforcement to review this decision. The Director affirmed the disallowance determination on June 26, 1987. DSS then appealed the finding to the HHS Departmental Grant Appeals Board which also affirmed the disallowance on December 14, 1987. By order entered on April 8, 1988, this court granted a preliminary injunction restraining HHS's efforts to offset the interest earned against reimbursable expenses, thus maintaining the status quo pending a decision on the merits. By order entered on July 14, 1989, the Court granted summary judgment to HHS. For the reasons set forth in that order, the Court is not convinced that DSS can make a strong showing that it is likely to succeed on the merits in its appeal. The other three factors in the four-factor test, however, weigh in favor of granting the stay.

Although the March 9, 1988, affidavit of James L. Solomon, Jr., DSS Commissioner, has not been revised to reflect the present financial situation of DSS's child support enforcement program, it is nonetheless a persuasive indication that a setoff against federal reimbursement would cause the program to suffer a reduction of staff, a loss of child support collections from parents, a decrease in the number of parents located and a decrease in paternity determinations. If HHS offsets against federal funding pending appeal, and if DSS is successful on appeal, DSS has made a strong showing that its child support

enforcement program will have suffered irreparable losses affecting its future operations. Related to the harm caused to DSS by a potentially wrongful setoff is the public harm that would result from less success in locating absent parents and decreased collections of child support payments.

HHS argues that the only damage alleged by DSS is monetary. HHS relies on several cases for the proposition that mere economic injury is generally not irreparable injury. In two cases cited by HHS, the plaintiff sought a stay to prevent his discharge from employment and consequent loss of income pending a judicial or administrative review on the merits. *Sampson v. Murray,* 415 U.S. 61 (1974); *Ciechon v. City of Chicago,* 634 F.2d 1055 (7th Cir. 1980). In another case a tender offeror sought to prohibit a target corporation from acting to thwart the tender offeror's acquisition efforts. *Gelco Corp. v. Coniston Partners,* 811 F.2d 414 (8th Cir. 1987). In those cases the courts found that the harm suffered could be fully remedied in a subsequent action for money damages. In a fourth case, *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921 (D.C. Cir. 1958), the Federal Power Commission ("FPC") had denied the plaintiff leave to intervene in FPC proceedings. The plaintiff appealed and moved to stay the proceedings pending court review. The court found no irreparable harm in permitting the FPC to continue its proceedings, concluding that, if the plaintiff prevailed on appeal, the FPC could begin de novo proceedings.

In contrast to the injury involved in the cases relied on by HHS, DSS stands to suffer more than "mere" monetary injury. DSS claims that a portion of its operations might have to be shut down for a period of time and its

long-term productivity may suffer. Irreparable harm has been found when one's allegedly unlawful actions will cause another's ongoing business to suffer or terminate absent an injunction. *See Ryko Mfg. Co. v. Eden Services*, 759 F.2d 671 (8th Cir. 1985) (temporary injunction against contract termination upheld where Eden might otherwise be forced out of business pendente lite); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) (temporary injunction prohibiting car dealership franchise termination upheld where franchisee would be forced to shut down absent injunction).

Furthermore, HHS has not shown that issuance of the stay would cause it substantial injury. HHS has asserted as its potential injury only a generalized loss of use of the funds during the pendency of the appeal. It has shown no other immediate or long-term detrimental effects that would result from a stay pending appeal. Its monetary interest can be sufficiently protected by recovery of post-judgment interest and costs should DSS fail in its appeal.

Accordingly, the Court grants DSS's motion for a stay pending appeal. Although neither party has addressed the issue, the Court further concludes that DSS need not post a supersedeas bond or other security in order to obtain the stay. Rule 62(d) provides that a stay can, with limited exceptions, be automatically obtained by giving a supersedeas bond. *See also* Local Rule 17.01, D.S.C. DSS has apparently chosen not to use that alternative but, instead, seeks a stay according to state law. Rule 62(f)), Fed. R. Civ. P.[1] In South Carolina, a judgment constitutes

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[1] Rule 62(f) provides:

> In any state in which a judgment is a lien upon the property of the judgment debtor and in which

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a lien on the property of the judgment debtor, the judgment debtor is in certain circumstances entitled to a stay of execution and a stay is granted the State, its officers and agencies without security. *See* §§ 15-35-810 and 18-9-130, Code of Laws of South Carolina, 1976, as amended; Rules 62, 62(e), S.C. R. Civ. P.; *cf. Hoban v. Washington Metropolitan Area Transit Authority*, 841 F.2d 1157 (D.C. Cir. 1988). Alternatively, the Court in the exercise of its discretion grants an unsecured stay. *See Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 636 F.2d 755 (D.C. Cir. 1980).[2] The court concludes that HHS's power to offset the amount previously

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(Continued from previous page)

> the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

[2] The District of Columbia Circuit Court of Appeals characterized the Fourth Circuit as a jurisdiction holding the view that a stay cannot be granted under Rule 62(d) without requiring security. *Id.* at 757, n. 3. As the District of Columbia Circuit itself recognizes, however, that view was expressed by way of dictum only. *Fidelity & Deposit Co. v. Davis*, 127 F.2d 780, 782 (4th Cir. 1942) ("bond securing payment of money judgment must be given, if . . . stay pending appeal is desired"). This Court has found no Fourth Circuit holding to that effect; moreover, the dictum in *Fidelity & Deposit* merely restates what Rule 62(d) provides. It does not, in this Court's reading, conclude that, apart from the automatic stay obtainable by posting bond, Rule 62(d) does not allow a court to dispense with bond in its discretion.

ordered against future reimbursements, together with the potential recovery of post-judgment interest and costs, constitutes sufficient security for payment.

IT IS SO ORDERED.

/s/ Karen LeCraft Henderson
KAREN LeCRAFT
HENDERSON
UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina

August 28, 1989

EXHIBIT F

The Department Grant Appeals Bd Decision

DEPARTMENTAL GRAND APPEALS BOARD

Department of Health and Human Services

SUBJECT: South Carolina Department of Social Services
Docket No. 87-130
Audit Control No. SC-86-0A3
Decision No. 926

DATE: December 14, 1987

DECISION

The South Carolina Department of Social Services (South Carolina) appealed a determination by the Office of Child Support Enforcement (OCSE) disallowing $777,746 in claims for federal financial participation (FFP) under Title IV-D (Child Support and Establishment of Paternity) of the Social Security Act (Act). OCSE's determination was based on an audit report which found that South Carolina did not credit these programs with interest earned on collected child support payments held by South Carolina during the period from October 1, 1981 through June 30, 1986.

We uphold the disallowance because we conclude that South Carolina is required by federal law, as a condition of the Title IV-D grant program, to credit the federal government with interest actually earned on the federal share of child support collections pending their distribution. As the Board has held in a series of cases, crediting of interest earned is required under section 455(a) of the Act, the cost principles at 45 C.F.R. Part 74, and guidance

documents issued by OCSE and the Office of Management and Budget (OMB). *See, e.g., Utah Dept. of Social Services,* DGAB No. 750 (1986); *New York Dept. of Social Services,* DGAB No. 794 (1986). We incorporate here the reasoning of these decisions, which we summarize below as we discuss new arguments raised by South Carolina.

Background

The Child Support Enforcement Program was established, under Title IV-D of the Act, to enforce child and spousal support obligations. Basic program functions include locating absent parents, determining paternity, establishing the amount of the child support obligation, and collecting support payments. *See generally* section 451 of the Act.

Title IV-D authorizes grant funding for the costs of operating the State's program. In order to obtain FFP, the State must operate the program in accordance with a federally approved state plan and all applicable federal regulations. Some of the funds collected under Title IV-D are collected on behalf of families which received assistance under the Title IV-A program, Aid to Families with Dependent Children (AFDC). Under section 457 of the Act, child support collections on behalf of these families are not distributed in full to the recipient families; funds are withheld to reimburse the governmental entities which contributed to the AFDC payments. The child support payments are distributed from Title IV-D program accounts according to a formula which requires that the federal share of the funds withheld are credited to the

federal government by the Title IV-A agency. *See* 45 C.F.R. 302.51.

Discussion

The auditors found that South Carolina earned interest on child support collections obtained by the South Carolina Department of Social Services in the operation of a program under Title IV-D of the Act, and held pending distribution according to the requirements of that program. The auditors relied primarily on section 455(a) of the Act, as amended by the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, section 2333(c). Section 455(a) of the Act contains a formula for determining the amount of FFP in a state's Title IV-D program under an approved state plan. The section states that, in applying the formula, "there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan."

South Carolina did not dispute the audit findings, conceding that the interest was actually earned on child support collections and was not subsequently used to offset program expenditures or otherwise credit the federal government with a share of the interest. Appendix to Appellant's Brief (App.) C, p. 3. South Carolina did not contest the amount which the auditors found was earned.

Instead, South Carolina argued that interest was not within the ambit of section 455(a) of the Act because that section should be limited to income from fees collected for providing services for families who do not receive Aid to Families with Dependent Children (AFDC) under Title IV-A. South Carolina further argued that the interest did

not result from "services provided under the [Title IV-D] plan," but from independent investment activities of the State Treasurer of South Carolina, a separate state agency which was not required under state law to credit the Title IV-D program with interest. Thus, South Carolina asserted, interest should not be attributed to the Title IV-D program. Finally, South Carolina argued that the disallowance was unfair because OCSE had not cited any problems with the treatment of interest income in two earlier audits of portions of the disallowance period.

In several recent cases, the Board upheld similar OCSE determinations that interest on child support collections is "income" for purposes of section 455(a) of the Act. *See, e.g., Utah Dept. of Social Services,* DGAB No. 750 (1986), pp. 1-7; *New York Dept. of Social Services,* DGAB No. 794 (1986), pp. 5-8. In summary, the Board reasoned that the phrase "other income" in the statute is broad enough to include income from interest earned on deposited funds. The Board also found that the interest income results directly from services under the Title IV-D program even though the program does not require investment of dormant funds, because the accumulation of principal balances is a direct result of Title IV-D collection services. *Id.*

Although South Carolina was aware of the Board's prior cases, it raised the same basic issues addressed in those cases. We reject those arguments again and generally incorporate the reasoning of those prior decisions here; but we consider some new points raised by South Carolina. South Carolina argued that the legislative and administrative background of section 455(a) indicates that the provision was intended to apply only to fees collected for

providing services for non-AFDC families. South Carolina submitted a letter from the current Secretary of Health and Human Services, which mentions only those fees in summarizing the draft bill which became P.L. 97-35. App. E. We find that this letter did not purport to be a detailed or precise explication of the statutory language, and its interpretation of the proposed section is not consistent with the final language of section 455(a) of the Act as it was passed by Congress. If Congress had intended to limit the section to fees only, no reference to "other income" would have been necessary.

South Carolina asserted that, in construing the term "other income" in section 455(a), it is relevant that Office of Management and Budget (OMB) Circular A-87, Attachment A, para. C (3) (made applicable to grants under the title IV-D program by 45 C.F.R. 74.171) does not refer to interest in defining and giving examples of "applicable credits." South Carolina argued that Congress could not have intended the definition of "other income" in section 455(a) to extend beyond the reach of the pre-existing definition of "applicable credits." In light of its allegation that interest was not within the scope of the definition of an "applicable credit," South Carolina concluded that interest should not be included as "other income."

We reject this argument for two reasons: South Carolina offered no evidence from the legislative history of section 455(a) to suggest that Congress considered the definitions in OMB Circular A-87 in drafting the section, and, even if Congress had considered those definitions, we find that Congress could reasonably have concluded that interest is, indeed, within the definition of applicable credits. In *North Carolina Dept. of Human Resources*, DGAB No. 361

(1982), the Board found that interest is an applicable credit within the scope of a regulatory provision identical to the provision in OMB Circular A-87. There, the Board found that, although interest is not explicitly cited as an example of an applicable credit, interest is within the broad category of examples which involve income generated out of the normal operation of a program. The Board relied on the fact that the principal sums were directly generated by the program involved to conclude that the interest earned must be credited against program expenses as an applicable credit and that, under general accounting rules, this result was required even if the interest arises from investment activities carried on by another arm of the grantee. South Carolina provided no basis to conclude otherwise in this case, or any evidence that Congress might have concluded otherwise. Thus, we agree with the respondent that, since interest is an applicable credit, it is reasonably included within the scope of the term "other income."

Indeed, in the *Utah* and *New York* cases cited above, the Board found that the applicable credit provisions were an alternate basis for the disallowance of interest income on undistributed funds, as well as the regulations concerning program income at 45 CFR Part 74.40 *et seq.* Since interest is within the scope of the definition of applicable credits, we affirm the findings in our prior cases that the applicable credit provisions are an alternate basis for the disallowance of interest income on undistributed program funds. Similarly, we find that, since this interest would constitute "program income," the disallowance is further supported by these regulations.

In sum, we find no basis to conclude that interest income is not within the scope of section 455(a). Since the statute is clear and we also find that the pre-existing regulations and applicable credit provisions are an alternative basis for the disallowance, we reject South Carolina's arguments that it lacked notice of OCSE's "interpretation" of the statute. Although OCSE issued an Action Transmittal, OCSE AT-82-8, in September, 1982, which explained the requirements of section 455(a) and specifically stated that interest earned on Title IV-D collections must be treated as income, we find that South Carolina had adequate notice from the statutory language itself, and from the regulatory requirements in OMB Circular A-87 regarding applicable credits, of its obligation to offset interest income from undistributed child support collections against Title IV-D program expenditures. In issuing OCSE AT-82-8, OCSE was not applying retroactively any new requirement, nor was it changing a previously held policy. Thus, this case is distinguished from *Daughters of the Miriam Center for the Aged v. Matthews*, 590 F. 2d 1240 (3rd Cir. 1978); there the issue was retroactive application of an interpretive rule which imposed conditions not in the statute itself and changed prior agency policy. In that case, the appellants could reasonably have relied on the earlier policy. In this case, by contrast, South Carolina demonstrated no reasonable basis in the statute or regulations for an alternative reading of the requirements.

South Carolina further argued that the interest was earned by the independent investment activities of the State Treasurer, a separate state agency which had no legal obligation under state law to return interest earned to the agency administering the Title IV-D program. In

North Carolina, cited above, the Board addressed a similar argument and concluded that, even if the interest earnings were used for unrelated purposes, this did not relieve a state of the obligation to account for that income in reporting expenditures.

South Carolina also alleged that it was within a temporary "exception" to the section 455(a) obligation which had been created by OCSE, in Action Transmittal OCSE AT-82-8. The Action Transmittal provided a temporary exception to requirements to reduce claimed expenditures by interest income for state agencies which demonstrate that they could not comply by reason of state law, until the first month after the close of the first session of a State's legislature ending on or after October 1, 1981. This arguably would reduce, but not eliminate the disallowance, since the disallowance period was from the quarter ended December 31, 1981 until the quarter ended June 30, 1986.

After examining the record, we must conclude that South Carolina has not demonstrated that it could not comply by reason of state law. South Carolina submitted provisions of state law which indicate that all funds received by any state agency must be deposited in "appropriate" accounts in the State Treasury, that the State Treasurer has full authority to invest those funds, and that all earnings of "general deposit" accounts shall become part of the State's General Fund. App. D. But those state law provisions also permit the State Budget and Control Board to authorize other types of banking arrangements for funds which can not be properly consolidated. App. D; S.C. Code Ann. 11-13-40, 11-13-125 (Law. Co-op 1976). South

Carolina provided no evidence that it had requested special treatment of Title IV-D funds. Thus, South Carolina did not demonstrate that it *could not* comply with interest reporting requirements by reason of state law, and the "exception" in OCSE AT-82-8 does not apply.

South Carolina further asserted that under the funding system for Titles IV-A and IV-D, the federal government is credited with its share of child support collections, prior to the time the funds are actually collected or held in Title IV-D accounts, by a reduction of the State's quarterly claims for advances of federal funds under Title IV-A by estimated child support collections during the quarter. According to South Carolina, since the federal share had already been credited, the interest was earned on state-only funds. In the *New York* case the Board directly addressed this contention, finding that the reduction in the estimated claim merely ensured that advances of federal funds reflected actual cash flow requirements, but did not credit the federal government with its share of the collections. The Board emphasized that it is the responsibility of the State to establish proper accounting techniques to distribute funds promptly and credit the federal government with a share of all program income. South Carolina provided no evidence that it had distributed the child support collections or credited program income to the federal government at any time earlier than the auditors identified.

South Carolina's final argument was that the disallowance was unfair because two prior OCSE audits covering portions of the disallowance period failed to identify errors in treatment of interest income. OCSE did not deny that these audits failed to identify errors in

accounting for interest. South Carolina provided no authority, however, which would support its contention that these audits precluded further review by OCSE. In *Pennsylvania Dept. of Public Welfare*, DGAB No. 451 (1983), the Board addressed a similar argument, and concluded that the failure to question costs in one audit did not preclude later review of those costs, at least when, in the prior audit, the auditors had made no affirmative judgment that the questioned costs were allowable and no final agency determination regarding allowable costs had been made. The Board reasoned that audit findings are not final agency determinations, but rather are simply recommendations to the agency. Thus, a state would not be justified in placing undue reliance on those findings, and those findings would not rise to the level of affirmative misconduct which could possibly preclude the agency from further review. We believe that this same reasoning is applicable to this case.

Even if South Carolina in good faith misunderstood the requirements of section 455(a) and OMB Circular A-87, and relied on the alleged assurances given in the earlier audits, we note that South Carolina has not shown that it suffered any detriment from that reliance. The misunderstanding resulted in South Carolina having the use of the federal share of interest earnings for several years before OCSE instituted this action to recover its share of those earnings. South Carolina benefitted from the misunderstanding by reaping a temporary windfall and is now being asked to return the federal share. Thus we must also reject South Carolina's assertion that the disallowance is unfair because we find that there was no detriment from its misunderstanding of the responsibility

to account for program income earned as interest on undistributed child support collections.

Conclusion

For the reasons discussed above, we uphold the disallowance of $777,746 in claims for FFP under Title IV-D based on South Carolina's failure to properly account for interest earned on undistributed child support collections.

Cecilia Sparks Ford

Alexander G. Teitz

Norval D. (John) Settle
Presiding Board Member

EXHIBIT G

The Statute to be Construed
Text of 42 USC § 655

§ 655. Payments to States

(a) Amounts payable each quarter. (1) From the sums appropriated therefor, the Secretary shall pay to each State for each quarter an amount –

(A) equal to the percent specified in paragraph (2) of the total amounts expended by such State during such quarter for the operation of the plan approved under section 454 [42 USCS § 654], and

(B) equal to 90 percent (rather than the percent specified in subparagraph (A)) of so much of the sums expended during such quarter as are attributable to the planning, design, development, installation or enhancement of an automatic data processing and information retrieval system (including in such sums the full cost of the hardware components of such system) which the Secretary finds meets the requirements specified in section 454(16) [42 USCS § 654(16)], or meets such requirements without regard to clause (D) thereof [42 USCS § 654(16)(D)].

(2) The percent applicable to quarters in a fiscal year for purposes of paragraph (1)(A) is –

(A) 70 percent for fiscal years 1984, 1985, 1986, and 1987,

(B) 68 percent for fiscal years 1988 and 1989, and

(C) 66 percent for fiscal year 1990 and each fiscal year thereafter.[;] except that no amount shall be paid to any State on account of amounts expended to carry out an

agreement which is has entered into pursuant to section 463 [42 USCS § 663]. In determining the total amounts expended by any State during a quarter, for purposes of this subsection, there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan approved under this part [42 USCS §§ 651 et seq.].

EXHIBIT H

The Intergovernmental Cooperation Act
31 USC § 6503(a)

§ 6503. Transfer and deposit requirements

(a) Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. A State is not accountable for interest earned on grant money pending its disbursement for program purposes.

EXHIBIT I

The Regulation 45 CFR § 304.50

§ 304.50 Treatment of program income.

The IV-D agency must exclude from its quarterly expenditure claims an amount equal to:

(a) All fees which are collected during the quarter under the title IV-D State plan; and

(b) All interest and other income earned during the quarter resulting from services provided under the IV-D State plan.

[49 FR 36772 9/19/84]

EXHIBIT J

42 USC 654.

PL 97-35 § 2333(c)

COST OF COLLECTION AND OTHER SERVICES FOR NON-AFDC FAMILIES

SEC. 2333. (a) Section 454(6) of the Social Security Act is amended –

(1) by striking out "such services" in clause (B) and inserting in lieu thereof "services under the State plan (other than collection of support)"; and

(2) by amending clause (C) to read as follows: "(C) the State will retain, but only if it is the State which makes the collection, the fee imposed under State law as required under paragraph (19);".

(b) Section 454 of such Act (as amended by section 2331(b) of this Act) is further amended –

(1) by striking out "and" at the end of paragraph (17);

(2) by striking out the period at the end of paragraph (18) and inserting in lieu thereof"; and "; and

(3) By adding at the end thereof the following new paragraph:

"(19) provide that a fee shall be imposed on the individual who owes a child or spousal support obligation, in accordance with State law, with respect to all such child and spousal support obligations for which collection is made by the State agency under this part on behalf of an individual not otherwise eligible for collection services (as determined for purposes of paragraph (6)) in an amount equal to 10 percent of

the amount so owed (and for purposes of this part, no part of the amount collected shall be considered to be a fee collected except amounts which exceed the actual amount of support owed).".

(c) Section 453(a) of such Act is amended by adding at the end thereof the following new sentence: "In determining the total amounts expended by any State during a quarter, for purposes of this subsection, there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan approved under this part.".

Supreme Court, U.S.
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No. 89-1884

In the Supreme Court of the United States

OCTOBER TERM, 1990

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary reasonably determined, in 45 C.F.R. 304.50(b), that interest earned by a State on child support payments collected with federal financial help constitutes "other income resulting from [child support enforcement] services" under 42 U.S.C. 655(a)(1).

2. Whether 45 C.F.R. 304.50(b) conflicts with the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a).

3. Whether the Secretary's interpretation of 42 U.S.C. 655(a)(1) applies "retroactively."

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 898 F.2d 147 (Table). The opinion of the district court (Pet. App. 7a-27a) is unreported. The opinion of the Departmental Grant Appeals Board (Pet. App. 28a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1990. A petition for a writ of certiorari was filed on May 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*, established the federal Child Support Enforcement Program to enforce child and spousal support obligations, including those owed by absent parents to their children who are receiving Aid to Families with Dependent Children (AFDC). Under the Program, each participating State must submit a plan for child support enforcement to the Secretary of Health and Human Services (HHS) for review and approval. 42 U.S.C. 652(a)(3), 654. The statute provides for federal financial participation equal to specific percentages of "amounts expended by [the] State * * * for the operation of the plan approved under [42 U.S.C. 654]." 42 U.S.C. 655(a)(1)(A).

Section 455(a) of the Social Security Act, as amended by Section 2333(c) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 863, 42 U.S.C. 655(a), limits the amount of federal financial participation based on the availability of other sources of program funding. The Act provides in pertinent part:

> In determining the total amounts expended by any State during a quarter * * * there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the [Title IV-D State] plan * * *.

42 U.S.C. 655(a)(1).[1]

In 1984, the Secretary promulgated regulations applying this requirement to interest earned on a percentage of state

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[1] In addition, the Act authorizes the Secretary to adjust later payments to States for overpayments of federal funds made in earlier fiscal quarters. 42 U.S.C. 655(b)(2). These adjustments flow from periodic audits. 42 U.S.C. 652(a)(4). Pursuant to this authority, the Secretary has promulgated federal regulations providing for audits of the Program. 42 C.F.R. Pt. 305.

child support collections equivalent to the percentage of federal financial support for the Program. Thus, 45 C.F.R. 304.50 provides in pertinent part (emphasis added):

> The IV-D agency must exclude from its quarterly expenditure claims an amount equal to:
>
> * * * * *
>
> (b) All *interest* and other income earned during the quarter resulting from services provided under the IV-D State plan.[2]

2. On November 24, 1986, HHS's Office of Child Support Enforcement (OCSE), which administers the Program, audited the interest earned by petitioner on child support collections for the period October 1, 1981, through June 30, 1986. It found that interest earned for the period of the audit totalled $1,110.571.59 and that $777,746 of that portion should have been returned to the federal government as its share of the earned interest. Pet. App. 8a, 28a. The OCSE disallowed this share from the amount due petitioner in federal financial participation under the Program. Petitioner requested review by OCSE's Director, who affirmed the disallowance. Petitioner then appealed to HHS's Departmental Grant Appeals Board, which also affirmed the disallowance. Pet. App. 28a-38a.

Petitioner then filed this action for review in federal district court. The court, in an order dated April 8, 1988, granted preliminary relief, but stayed the proceedings pending disposition of a parallel petition for review filed in the court of appeals.[3] When the court resumed its

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[2] Action Transmittal 82-8, issued by the Office of Child Support Enforcement on September 3, 1982, contained a substantially identical provision.

[3] Because of the possibility that the appellate court rather than the district court would have jurisdiction pursuant to 42 U.S.C. 1316(a)(3), petitioner had simultaneously filed a petition with the court of appeals

proceedings, on July 14, 1989, it granted summary judgment in favor of the Secretary. Pet. App. 7a-20a.

The court first determined that Section 655(a)(1)'s exclusion from state spending totals of "any fees collected or other income resulting from services" provided under the child support enforcement plan included interest earned on collected payments because interest is "ordinarily considered" to be income.[4] Further, the income "result[ed] from the program" because without the federal program, the State would not have had the money to invest. Pet. App. 12a.

The court next rejected the contention that Section 655(a)(1) applied only to fee income earned from non-AFDC services and thus did not apply here because the interest at issue derived from both AFDC and non-AFDC services. Pet. App. 12a-13a. The court adopted the government's reasoning that since the statute "applie[d] both to 'fees' collected from non-AFDC clients and 'other income,' " it should be read to include income due to AFDC services in order to avoid rendering meaningless the "other income" language. The court further noted that the provision at issue was separately codified under Section 655, while the rest of the enactment (Section 2333, 95 Stat. 862-863), which deals generally with fees for non-AFDC participants, was codified under Section 654. In the court's view, the separate codification supported the conclusion that Section 655(a)(1) is not limited in application to income from non-AFDC services. Pet. App. 13a-14a.

The court then turned to petitioner's contention that the State was expressly allowed to keep the interest by the

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raising the identical issue. The court of appeals ruled that it lacked jurisdiction directly to review the Appeals Board's decision. *South Carolina Dep't of Social Servs. v. Bowen*, 866 F.2d 93 (4th Cir. 1989).

[4] The district court erroneously identified Section 655(a)(1) as 42 U.S.C. 655(a)(2) throughout its opinion.

Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a), which provides that "[a] State is not accountable for interest earned on grant money pending its disbursement for program purposes." Petitioner had argued that the federal share of child support collections functioned as AFDC "grant-in-aid funds" because the State generally retained that share, crediting it towards federal AFDC grant monies due the State. See Pet. App. 14a.

Quoting from the balance of Section 6503(a), the court noted that the Act was "intended to reduce the amount of interest that states may earn on federal grant-in-aid funds" by minimizing the time between federal transfer and state disbursement of funds. Petitioner's interpretation was unsatisfactory since it "would increase, rather than decrease, the state's opportunity to earn interest on federal funds" in contravention of this purpose. Pet. App. 15a-16a. Second, the court concluded that substituted funds did not come within the definition of "grant" in the Cooperation Act as "money * * * that is *paid or provided* by the United States Government under a fixed annual or total authorization, to a State." 31 U.S.C. 6501(4)(A) (emphasis added). As the court pointed out, the federal government could normally control the timing of a transfer of funds to a State and thus maximize the amount of interest earned; it lost its ability to do so "[w]hen a state already has the funds for disbursement in its control and uses these to offset funds that the federal government would otherwise have 'paid or provided' to the state." Pet. App. 16a-17a.

Finally, the court determined that Section 655(a)(1), as interpreted in 45 C.F.R. 304.50, could be applied to petitioner from October 1, 1981, the effective date of the relevant language in Section 655(a)(1). That application would not be impermissibly retroactive because "[w]hen HHS later promulgated the regulation [in 1984] * * * it merely clarified the statute; it did not change the statute's meaning."

Pet. App. 18a. Relying on this Court's decision in *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129 (1936), the court therefore concluded that this was not a problematic "retroactive change of settled law." Pet. App. 17a-18a.[5]

5. In a *per curiam* unpublished opinion, the court of appeals affirmed. Pet. App. 1a-3a. The court noted that the sole error in the district court's opinion was that it had applied "an incorrect ['arbitrary' and 'capricious'] standard of review to the Secretary's interpretation of 42 U.S.C. 655(a)" since, under this Court's opinion in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "[t]he Secretary's interpretation, as manifested in the regulation he has promulgated, must stand as long as it is reasonable." Pet. App. 3a. The court of appeals then concluded that 45 C.F.R. 304.50 is "a reasonable interpretation of [the statute], that it does not constitute a retroactive application of the statute, and that it is consistent with the Intergovernmental Cooperation Act" for the reasons stated by the district court. Pet. App. 3a.

ARGUMENT

Petitioner seeks review of an unpublished (and therefore non-binding[6]) *per curiam* decision on an issue that has yet to be addressed by any other circuit. Moreover, the deci-

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[5] The court also concluded that, even if it believed that the regulation warranted retroactivity analysis, it would find that the regulation should apply because "the balance of harm does not preponderate for or against any party—one or the other is going to suffer the loss of the same amount of money." Pet. App. 17a-18a.

In addition, the court declined to attach any significance to the fact that prior OCSE audits had not objected to interest retention by the State before, noting that petitioner had not shown that it justifiably relied on the results of the audits. Pet. App. 19a n.3.

[6] Pet. App. 2a; see 4th Cir. I.O.P. 36.4, 36.5.

sion below is correct and is not in conflict with any decision of this Court. Further review is therefore unwarranted.

1. As the court below noted (Pet. App. 3a), the Secretary's interpretation of the statute must prevail if it is reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Here, his interpretation—that Section 655(a)(1) applies to interest earned on child support collections—follows naturally from the statutory language. The Section provides that petitioner must deduct "other income resulting from services provided under the [Title IV-D] plan." It is undeniable that the concept of "income" encompasses interest. Further, the interest here clearly "resulted" from child support enforcement services since, as the Secretary, the district court, and the court of appeals recognized, petitioner's treasurer "would not have the money to invest without the federal program." Pet. App. 12a.[7]

Moreover, the Secretary's interpretation furthers the statutory purpose. Petitioner claims it may invest child support payments collected with federal help, use the interest for general state purposes, and incur no proportional offset in federal enforcement aid. This, of course, substantially inflates petitioner's apparent need for such federal funds. But federal help for child support enforcement was designed to enhance child support collections and thus reduce the need for federal AFDC expenditures, not to provide windfall profits for the States. It is therefore only reasonable to expect that such income will be counted in determining state need for further federal assistance.

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[7] The fact that in theory either petitioner or its state treasurer could have held these funds rather than invested them is irrelevant. In the district court's words, petitioner's "internal investment decisions cannot determine the correct construction of a federal statute." Pet. App. 12a.

Petitioner argues (Pet. 11) that Section 655(a)(1)'s exclusion refers only to costs and fees for child support services obtained from non-AFDC families, the only clients required to pay for child support services. Under this interpretation, "other income" could mean only non-AFDC "costs in excess of the fees," which the States may collect under Section 654(6)(E).[8] See Pet. 14. But the provision for collecting these "costs" was only enacted in 1982. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 171(a)(3), 96 Stat. 401. Section 655(a)(1) was amended to refer to "any fees collected or other income resulting from services" in 1981. § 2333(c), 95 Stat. 863. Petitioner's argument thus leaves the term "other income," as it was enacted in 1981, with no reasonable content.

Petitioner's reliance on the legislative history is also misplaced. Pet. 11-14. That history demonstrates only that, as the title of the 1981 legislation suggests, the principal thrust of the legislation was to deal with the "Cost of Collection and Other Services for Non-AFDC Families." § 2333, 95 Stat. 862-863. But while the remainder of the legislation was codified in 42 U.S.C. 654, the "other income" language was codified under 42 U.S.C. 655, broadly relating to "Payments to States." This separate codification supports the Secretary's reading of the statute's language.[9]

[8] Section 654(6)(D) was redesignated as Section 654(6)(E) by the Family Support Act of 1988, Pub. L. No. 100-485, Tit. I, § 111(c), 102 Stat. 2349.

[9] Petitioner also relies on the fact that the original proposed HHS Regulation, 42 C.F.R. 304.50, which restated Section 655's language, evoked a comment from an individual who suggested that this language could be construed as not including interest income, and that HHS responded that it "agree[d] that interest income could *possibly* be construed as exempt from the proposed [regulation]. Therefore, we revised the final [regulation]." Pet. 15-16 (emphasis added). As the district court observed (Pet. App. 19a n.3), however, all this shows is HHS's recognition "that the statute may be read in more than one way."

2. Petitioner's contention that the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503 (p. 5, *supra*), shelters its investment earnings is also without merit.[10] Under this view, a percentage of state child support collections (which the State collects with federal help) itself becomes a "grant" because federal AFDC grants are reduced by that percentage. But, as the district court and court of appeals held, the Act is far more straightforward: it defines "grants" as amounts "paid or provided" by the United States under a fixed annual or total authorization.[11] 31 U.S.C. 6501(4)(A); see, *e.g.*, *North Carolina* v. *Heckler*, 584 F.Supp. 179, 185-186 (E.D.N.C. 1984). Funds from non-federal sources, such as a parent's payment of child support, do not become federal funds just because the government accounts for them in determining the level of federal grants. As the district court pointed out (Pet. App. 17a), the federal government does not control transfer of such funds. Since the government therefore cannot maximize the interest earnings on those funds, they are unlike the "grants" that are the subject of the Act. See 31 U.S.C. 6503(a). Thus, petitioner's construction would create a large and continuing windfall to the States, an end the Act sought to avoid. See H.R. Rep. No. 1845, 90th Cong., 2d Sess. 9 (1968).

3. Finally, there is no basis for petitioner to resist the recovery of interest for the period subsequent to October 1,

[10] Petitioner did not present its Intergovernmental Cooperation Act argument to the Grant Appeals Board. Therefore, it is at least doubtful whether it was entitled to raise it subsequently. See, *e.g.*, *Senn Trucking Co.* v. *ICC*, 560 F.2d 1179, 1182 (4th Cir. 1977).

[11] To the extent that the word "provided" has a meaning independent of "paid," it most likely refers to cases where federal money is transmitted to a state through an intermediary, such as the Corporation for Public Broadcasting. See 47 U.S.C. 396(g)(2)(B) (authorizing the Corporation to "make grants to public telecommunications entities, national, regional, and other systems of public telecommunications entities").

1981 (the effective date of the amendment to Section 655(a)(1) at issue here), but prior to September 19, 1984 (when the regulation was promulgated). As the district court and court of appeals recognized (see Pet. App. 18a-19a), the regulation raises no significant issue of retroactivity. The regulation is not legislative in character; rather, it simply interprets a preexisting statutory requirement and thus, "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936); K. Davis, *Administrative Law Text* § 5.05, at 135 (3d ed. 1972).[12]

"[T]he fact that the first [SC-82-AC, dated November 17, 1983] and third [SC-84-PR, dated June 17, 1986] of three audits done by the Secretary during the period in question made no mention of DSS's not excluding the interest on the collections" (Pet. 22-23) does not demonstrate agency "inconsistency" (Pet. 23) or buttress petitioner's retroactivity claim.[13] The failure of the audits to address the matter of interest does not establish the existence of any settled standard authorizing the State to keep such interest for its own purposes. In fact, the statute specifically contemplates that

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[12] Petitioner has not claimed that the regulation disturbed any prior settled interpretation. In fact, as early as September 3, 1982, an OCSE Action Transmittal (82-8) to the States specifically articulated the interest income requirement. And when the regulation embodying the requirement was proposed, it did not evoke any widespread protests as one might expect if a settled rule were being significantly altered. Only one State, apparently not petitioner, objected that the regulation was inconsistent with the statute. See 49 Fed. Reg. 36,771 (1984).

[13] In fact, the issue was raised in audit report number SC-83-PM, dated August 10, 1984. The last of the three reports (SC-84-PR, June 17, 1986) referred back to still unresolved problems in connection with the second report.

the Secretary will make readjustments with respect to the payments made in prior quarters. 42 U.S.C. 655(b)(2).[14]

Nor can petitioner establish what amounts to an estoppel claim against the United States. This Court has recently confirmed that the Executive Branch cannot be required to pay funds out of the Treasury—as would be required here were credit for the interest not forthcoming—without the statutory authorization mandated by the Appropriations Clause. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990). In this case, the failure of government officials to identify a problem in an audit cannot increase the amount payable by the government pursuant to law.

In any event, as the district court and court of appeals also determined (see Pet. App. 19a n.3), petitioner cannot show that it justifiably relied on the audits. And, even if it did so rely, its reliance was not detrimental. Rather, petitioner has long enjoyed the benefits of the interest income it accumulated between 1981 and 1986. Estoppel is not an available remedy for such a boon. See *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 61-63 (1984).

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[14] In any case, both courts below concluded that, even if it were appropriate to apply retroactivity analysis in this case, the regulation could be applied to petitioner. As the district court put it, "the balance of harm does not preponderate for or against any party" since "one or the other is going to suffer the loss of the same amount of money." Pet. App. 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

Petitioner South Carolina Department of Social Services (DSS) respectfully replies to the Brief for the Respondent Secretary Sullivan (Secretary), et al. in Opposition as follows:

ARGUMENT

I.

THE SECRETARY'S APPLICATION OF 42 U.S.C. § 655(a)(2)(C) IS CLEARLY NOT REASONABLE

The Secretary's application of section 655(a)(2)(C) to DSS through 45 C.F.R. § 304.50 is unreasonable because it conflicts with the plain meaning of § 655(a)(2)(C) and 31 U.S.C. § 6503(a) and substantial legislative history discussed in DSS's Petition and additional history set forth below. Although the Secretary contends in his Brief in Opposition that the interest money is "income resulting from [child support enforcement] services" because the collections on which the interest is earned are authorized by federal law, this argument clearly overlooks that nothing in the federal requirements for the child support enforcement services directs the states to invest child support collections. Had South Carolina not undertaken to earn interest on the money, the parties would not be in court now. Had Congress intended for such interest to be reached, it could have specified in § 655(a)(2)(C) that interest would be offset as the Secretary did in 42 C.F.R. § 304.50.

Respondents also contend that the words "other income" in section 655 have no reasonable content unless applied to interest, but the Secretary overlooks substantial additional legislative history concerning "cost in excess of . . . fee" provisions now codified under 42 U.S.C. § 654(6)(E). The Secretary points to the fact that provisions for non-AFDC costs in excess of fees, which would constitute income other than fees, were enacted in

1982, a year after section 655(a)(2)(C) was added; however, section 654, as originally enacted in 1974, contained the costs in excess of fees provisions (PL 93-647, Part B, § 101(a), 88 STAT. 2337), and these provisions were retroactively returned to federal law effective August 1981 by the 1982 legislation, PL 97-248 § 171, 96 STAT. 401; *see also* Senate Report, *U.S. Code of Congressional and Administrative News*, 97th Congress, 2nd Session, Vol. 2 at 790 and 830. Even in 1981, when the costs in excess of fees provision was deleted, a 10% fee was substituted which was intended to be a means for recovering costs of the states. *See Senate Report, supra,* 97th Congress, Vol. 2 at 830. Congress has also subsequently treated other fees as income as in the version of § 654(6)(B) enacted in 1984 by PL 98-378 § 3(c) (98 STAT. 1310) which provides for the treatment of an application fee as "income." Therefore, Congress clearly contemplated other sources of "income" at the time it passed section 655(a)(2)(C).

The Secretary also errs in relying upon the codification of section 655(a)(2)(C). As discussed in the Petition herein, when section 655(a)(2)(C) was enacted as a part of § 2333 of PL 97-35, (95 STAT. 862 and 863), the title to § 2333 referred only to "cost of collection and other services for non-AFDC families", and all other parts of that section, of which section 655(a)(2)(C) was a part, referred to non-AFDC matters. Although section 2333(c) was recodified as section 655(a)(2)(C) by section 171 of PL 97-248, 96 STAT. 401, section 171 also applied only to non-AFDC matters, and indicated no intent whatsoever to broaden the reach of section 2333(c). Moreover, as noted in the Petition, codification cannot change the effect of laws unless such intent is clearly expressed.

Finley v. U.S., ___ U.S. ___, 104 L.Ed.2d 593, 109 S.Ct. [Interim Ed] 2003 (1989). No such intent was expressed here because the codification provision was in the non-AFDC provision of 1982 legislation just as § 655(a)(2)(C) was first enacted in non-AFDC provisions in 1981.

The Secretary misconstrues DSS's argument concerning the Intergovernmental Cooperation Act, 31 U.S.C. § 6503(a). He erroneously states that the federal government does not control the transfer of child support collections so as to "maximize the interest earnings on those funds." Section 6503(a) says nothing about maximizing federal interest earnings on grant funds. Instead, it states that federal agencies shall transfer grant money " . . . to *minimize* the time elapsing between transfer of the money from the Treasury and the disbursement by a state. . . . " (emphasis added). The federal government can, of course, through regulation affect the time of the disbursement of the child support collections, and it already provides for how the collections shall be utilized as replacements for AFDC grant funds. 45 C.F.R. §§ 232.20(c) and 302.51(b)(2) and (4). Clearly, the collections function as grants under § 6503(a), and as such under that statute, the interest earned is not subject to offset.[1]

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[1] The Secretary erroneously indicates that § 6503(a) may not be properly before the Court, an issue that he did not raise in his Answer to the Complaint in the District Court (Record below, 19). DSS did not specify that statute before the Grant Appeals Board but it was not required to do so in that DSS clearly raised the issue that § 304.50 was in excess of statutory authority (Record below, 117). Section 6503(a) supports that argument that section 304.50 is in excess of authority, and section 6503(a) was addressed by both the District Court and the Court of Appeals. (App. to Petition, 3a and 14a-17a).

II.

SECTION 304.50 SHOULD NOT BE APPLIED RETROACTIVELY

The Secretary errs in construing section 304.50 as being interpretive. That this regulation went through the notice and comment requirements of the Administrative Procedure Act indicates that it is legislative because typically that procedure is reserved for legislative or substantive rules, and interpretive or clarifying rules may be adopted without notice and comment. *See* 5 U.S.C.A. § 553(b)(3)(A); *U.S. v. Shelton Coal Corp.*, 829 F.2d 1336 (4th Cir. 1987). In addition, that this regulation is legislative rather than interpretive is further supported by the fact that the term "interest" is expressly added by the regulation to the statutory language of section 655(a)(2)(C). Section 655 provides for the exclusion of " . . . fees collected or other income resulting from services provided. . . . " Section 304.50 provides for the exclusion of "fees . . . *interest* and other income. . . . " (emphasis added).

Although DSS noted in its earlier brief that only the second of three federal audits mentioned the interest on collections issue and that the third audit's failure to mention it gave DSS reason to believe that the Secretary was no longer seeking the interest money, the Secretary erroneously contends that the third audit report did reference the collection actions noted in the second audit. (Brief of Respondents, p. 10, n. 12). Instead, the third audit referred to matters in the second audit report other than the interest problem in that report. (Record below, p. 54). The Secretary also states that the failure of audits to address the matter of interest does not indicate a federal

standard authorizing states to keep the interest; however, under federal regulations, the audits are supposed to be complete and comprehensive as to the conformity of the operation of state programs with federal requirements. 42 U.S.C. § 652(a)(4) and 45 C.F.R. §§ 305.10 and 305.36. Therefore, DSS was justified in relying upon the audits.

The Secretary also referred to the Action Transmittal that required states to deduct the interest and which was received by DSS on October 20, 1982 (Record below 54). The Action Transmittal lacks the force and effect of law because it was not a regulation adopted pursuant to the Administrative Procedures Act, 5 U.S.C. § 553. *Texaco, Inc. v. Federal Power Comm.*, 412 F.2d 740 (3rd Cir. 1965). Moreover, even if, *arguendo*, the Action Transmittal 82-8 had the force and effect of law, it would not allow the recovery of interest prior to October 20, 1982.

The Secretary erroneously contends here that the executive branch would be required to pay funds out of the Treasury "were credit for the interest not forthcoming." (Brief of Respondent at p. 11) This argument overlooks that the claims of DSS for reimbursements under the Child Support Enforcement Program have already been made for the years in question and no additional monies would be forthcoming from the Treasury for those periods if the Court were to rule with DSS here. Instead, DSS would be the entity that would have to repay money which would require the transfer of over $777,000.00 to the United States Government. Although as noted in DSS's Petition, counsel for DSS is informed that DSS now has some funds available for at least partial payment of the interest in question (Petition at 21), DSS did not have such funds at the time the issues of retroactivity were

addressed in the District Court and DSS would not have this money set aside now had the District Court not granted stays. Although the Secretary refers to the District Court's opinion stating that the balance of the harm does not preponderate for or against any party, the District Court later found differently when it granted DSS a stay on appeal on the basis of losses to DSS. (App. Ex. E, p. 21A). Moreover, the Secretary surely cannot say that DSS's reliance was not detrimental as to the prior audits and other factors which indicated to DSS that section 304.50 was not retroactive. DSS would now be the agency that would lose hundreds of thousands of dollars six years after the 1981-84 period to which the Secretary erroneously tries to apply section 304.50 retroactively.

CONCLUSION

The South Carolina Department of Social Services respectfully submits that its Petition for Writ of Certiorari should be granted in that section 304.50 and the actions of the Secretary clearly exceed the intent of Congress under 42 U.S.C. § 655 and 31 U.S.C. § 6503.

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